

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME, COUNCIL 81, LOCAL 1607,)	
Charging Party,)	
)	
v.)	<u>ULP No. 01-01-306</u>
)	
NEW CASTLE COUNTY,)	
Respondent.)	

INTERIM DECISION

AFSCME, Council 81, Local 1607 ("AFSCME" or "Union") is an employee organization within the meaning of §1302(h) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) ("Act"). AFSCME is the exclusive bargaining representative of certain salaried employees, including employees in the Emergency Medical Services Division ("EMS Division") of the Police Department of New Castle County ("County"), within the meaning of §1302(i) of the Act. The County is a public employer within the meaning of §1302(m) of the Act.

On January 18, 2001, AFSCME filed the instant unfair labor practice charge alleging that by unilaterally imposing Revised Policy 308, including a twenty (20) hour limit on the number of hours bargaining unit employees may work weekly outside employment, the County violated §1307(a) (5), of the Act. ¹AFSCME requested that the matter be set for an

¹§1307. Unfair labor practices. (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following: (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject of bargaining.

expedited hearing or, in the alternative, that the Public Employment Relations Board issue an interim order temporarily enjoining the County from implementing any change to the outside employment policy ("Policy 308") until such time as the Charge is finally resolved.

On January 29, 2001, the County filed its Answer denying the Charge, objecting to the requested interim relief and setting forth New Matter.

On January 30, 2001, AFSCME filed its Response denying the New Matter set forth in the County's Answer.

On March 14, 2001, the Executive Director issued a Probable Cause Determination in which he concluded that the pleadings constituted probable cause to believe that an unfair labor practice may have occurred. The Union's request for preliminary injunctive relief was denied for the reason that the required element of irreparable harm was not present. Judgement on the remaining defenses was reserved pending the receipt of argument.

On March 30, 2001, the County filed an Amended Answer raising the following new affirmative defenses:

1. The Charge is barred by the applicable statute of limitations.
2. The Union has waived its right to bargain over or has acquiesced to the terms of the outside employment policy.

A hearing was held on April 12, 2001, for the purpose of establishing a factual record upon which a decision could be issued. Prior to the receipt of evidence the Executive Director denied the Union's request to strike the County's Amended Answer citing PERB Rule

5.8, Amendment of Complaint and/or Answer, which provides, in relevant part:

(c) Subject to the approval of the Board, an Answer may be amended in a timely manner, upon motion of the party filing it. Such motion shall be in writing, unless made at the hearing and before commencement of the testimony. In the event the complaint is prejudiced by the amendment, a motion for continuance will be granted.

The ruling of the Executive Director was further supported by the absence of any alleged prejudice resulting from the filing of the Amended Answer.

FACTS

On June 13, 1994, Lawrence E. Tan, Deputy Chief of the EMS Division, provided Richard Krett, President of AFSCME Local 1607, with a copy of the Emergency Medical Services Policy and Procedures Manual, providing in relevant part:

ADMINISTRATIVE POLICIES

Administrative Policy 308: Outside Employment

Section 1.3: All EMS Division personnel are required to submit a letter, via the chain of command, to the Director of Personnel for approval of any outside employment.

Reference Section: Copies of opinions regarding Outside Employment issued by the New Castle County Ethics Commission have been included in the Reference Section of this manual.

Pursuant thereto, the County issued the following document dated July 1, 1994:

ADMINISTRATIVE POLICY NO. 308 OUTSIDE EMPLOYMENT

1.1 The Emergency Medical Services Division seeks

personnel that are dedicated to the lifesaving mission of the division. However, it is recognized that some employees pursue other employment during the hours they are not working for the County.

1.2 Pursuant to Section 2-30 et seq. of the New Castle County Code, no County employee shall engage in any conduct that constitutes a conflict of interest. Moreover, every employee must avoid an appearance of impropriety.

1.3 To ensure compliance with the Code, all EMS Division personnel are required to submit a letter to the Director of Public Safety through the EMS Division chain of command informing the director of any outside employment and requesting approval. The director will respond to the requesting personnel informing them of the decision.

1.4 Personnel found in violation of this order shall be subject to discipline.

1.5 In the reference section of this manual are copies of opinions issued by the Ethics Commission regarding outside employment. Additionally, the applicable County Code has been enclosed. While no decision has been issued concerning EMS employees, the related opinions may prove instructive. Employees are encouraged to seek the advice of the Ethics Commission on the propriety of outside employment.

It is undisputed that at all times relevant to this matter the Union was aware of the 1994 Policy, was not consulted prior to the Policy being issued and did not contest the Policy for any reason. It is also undisputed that Policy No. 308 was the only policy addressing outside employment in the EMS Division until the issuance of a revision dated January 4, 2001.

During the period between June 13, 1994, until January 4, 2001, the only document other than Policy 308 to address outside employment was a memorandum issued by Chief Tan on March 4, 1998. It provides:

TO: ALL EMERGENCY MEDICAL SERVICES PERSONNEL
FROM: Lawrence E. Tan
Emergency Medical services Operation
SUBJECT: **OFF-DUTY EMPLOYMENT**
DATE: March 4, 1998

The department is currently in the process of updating its records regarding which employees in the Police, Emergency Communications and Emergency Medical Services sections currently have outside employment obligations.

Each employee, who is employed outside the department during off-duty hours, must submit a memorandum to the Chief of Police, via the chain of command. The memorandum shall include the following information:

- * The name of the employer(s) and their addresses
- * Nature of work to be performed.
- * Amount of hours to be worked per week.

The Colonel must receive these memoranda by Friday, March 6, 1998. The administrative EMS shift supervisor will be responsible for contacting off-duty personnel to ensure that the correspondence is ready to be submitted upon the employee's return to duty.

It is the January 4, 2001 revision to Policy 308 which lies at the center of this dispute. It provides:

1.0 **GENERAL**

- 1.1 The Emergency Medical Services Section seeks personnel that are dedicated to supporting the primary mission of the agency. However, it is recognized that some employees may wish to pursue outside employment.
- 11.2 All EMS Section personnel are required to submit a letter to the Chief of Police, through the EMS Section chain of command, informing the Chief of any outside employment and requesting approval.
- 1.3 Personnel found in violation of this policy shall be subject to disciplinary action.

2.0 **CONDITIONS OF OUTSIDE EMPLOYMENT**

- 2.1 Off-duty employment by departmental personnel shall be governed by the following conditions:
 - 2.1.1 An employee must request and receive written authorization of the Chief of Police prior to undertaking outside employment.
 - 2.1.2 Requests for authorization must be submitted through the chain of command to the Chief of Police.
 - 2.1.3 The immediate supervisors of the requesting employee are to make recommendations concerning the request.
 - a. All requests must include:
 - i. The prospective employer's name and address;
 - ii. Nature of work to be performed and,
 - iii. Amount of hours expected to be worked each week.
 - b. Off-duty employment shall not exceed

twenty (20) hours per pay week.
(Monday-Sunday)

- 2.2 Authorization for outside employment shall apply only to the specific work and employer requested.
- 2.3 All changes regarding the type of employment or employer will require a separate request and authorization.
- 2.4 Employee participation in outside employment is prohibited under the following conditions:
 - a. While the employee is on sick leave,
 - b. While the employee is on injured duty status,
 - c. While the employee is on light duty,
 - d. If the employment requested involves participation in a labor dispute,
 - e. While the employee is on Field Training and/or Field Evaluation or student status.
- 2.5 Employees engaging in self-employment activities are governed by all provisions regulating off-duty employment, including the twenty (20) hour per workweek limitation.

ISSUE

Whether the County's unilateral implementation of revised Policy No. 308, Outside Employment, effective January 4, 2001, violated 19 Del. C. Section 1307(a)(5)?

PRINCIPAL POSITIONS OF THE PARTIES

County: Based upon personal conversations with affected employees, Union President Kenneth Dunn was aware, since at least March, 1998, that approval for outside employment was based, in part, upon the number of

hours requested. Thus, the unfair labor practice charge filed on January 18, 2001, contesting the twenty (20) hour per week limit, was filed well after the expiration of the 180 day filing period set forth in 19 Del.C. §1308.

The County argues that based upon the failure of the Union to object to the 1994 policy, the continuing knowledge of Union President Dunn since March, 1998, of the limit on the number of hours of outside employment permitted and the Union's agreement to the language contained in Article 104, of the collective bargaining agreement entitled, The County and Management Policies and Rules, the Union waived its right to bargain over or has acquiesced to the terms set forth in Policy 308.

The County argues the unfair labor practice charge should be dismissed because the Union failed to exhaust the available contractual remedies to resolve the allegations set forth in the Charge.

Concerning the underlying substantive issue, the County contends the subject of outside employment is reserved exclusively to management pursuant to Paragraph 104 of the collective bargaining agreement and constitutes an inherent managerial prerogative under the 19 Del.C. §1305 about which the County is not required to bargain.

The County contends that should the Union ultimately prevail on the merits, no damages are warranted since the statute of limitations for each individual EMS employee commenced on the date his or her respective application for outside employment was rejected based on the excessive number of hours requested or when the applications were subsequently approved when the hours requested were reduced to less than twenty (20).

AFSCME: The memorandum of March 28, 1998, authored by Lawrence Tan, Commander of the Medical Services Operations, was, by its terms, for the sole purpose of updating the County's records concerning outside employment. Consequently, the memorandum cannot reasonably be construed as formal notice of a revision to Policy 308 capping the number of permissible hours of outside employment at twenty (20) hours per week.

Nor did the County's dealings with individual employees constitute notice to the Union of the twenty (20) hour limit. Union President Dunn was not told nor was he otherwise aware of the Departmental policy limiting the number of hours of outside employment until approximately December, 2000, when Paramedic Steven Moore questioned President Dunn about the approval of his application subject to the "departmental guideline" that "all extra employment is limited to a maximum of twenty (20) hours per week." Only after President Dunn questioned Team Leader Krett, Commander Tan and Colonel Cunningham was the 1994 policy formally revised and the Union advised.

In the absence of specific knowledge of the twenty (20) hour cap, there was no informed waiver by the Union of its right to contest the unilateral implementation of revised Policy 308. Consequently, the unfair labor practice charge filed on January 18, was clearly filed within 180 days following the unilateral implementation of revised Policy 308 on January 4, 2001.

The Union further argues that Paragraph 104 of the collective bargaining agreement does not constitute a general waiver of its statutory right to negotiate changes in the status quo of a mandatory subject of bargaining. AFSCME disputes the County's contention that the subject of outside employment constitutes either a management

prerogative under Paragraph 104 of the collective bargaining agreement or an inherent management right under 19 Del.C. Section 1305, about which the County is not required to bargain.

AFSCME contends that in the absence of a provision in the collective bargaining agreement concerning outside employment, there is no available contractual remedy which the Union is required to pursue. Rather than a violation of the parties' collective bargaining agreement, the Charge alleges a violation of 19 Del.C. §1307, for which redress is available exclusively through the filing of an unfair labor practice for resolution by the PERB.

DISCUSSION

The following discussion addresses the affirmative defenses raised by the County in its Answer and Amended Answer all of which were denied by AFSCME:

Waiver by Contract Language: Article 104 reserves to management the authority to promulgate reasonable rules and regulations "with regard to . . . any matter involving the management of governmental operations vested by law in the County." Rather than the management of governmental operations, revised Policy 308 addresses the use of off-duty personal time by employees of the EMS Division.

The County's position fails to take into account the impact of 19 Del.C. Chapter 13. By its terms, Article 104 pertains only to governmental operations which are, "vested by law in the County". 19 Del.C. Section 1302(e), establishes a "duty to bargain" over "terms and

conditions of employment".² If, as AFSCME contends, outside employment is determined to constitute a "term and condition of employment" the statutory duty to bargain limits the County's unfettered authority to manage governmental operations as it alone determines and cannot be ignored.

A valid waiver must be clear and unmistakable. Red Clay Ed. Assn. v. Red Clay Bd. of Ed. Del. PERB, C.A. 11958, II PERB 753, 765-774 (1992). Article 104 of the collective bargaining agreement between the County and AFSCME, THE COUNTY AND MANAGEMENT POLICIES AND RULES, is a broadly worded provision which contains no specific reference to outside employment. It provides:

The Union agrees that the County has complete authority over the policies and administration of all County departments which it exercises under the provisions of law and in fulfilling establishment of rules and regulations not inconsistent with the terms of this Agreement. Any matter involving the management of governmental operations vested by law in the County, and not covered by this Agreement, is the province of the County. Should the Union object to any rule or regulation as being violative of this Agreement, it may resort to the grievance procedure outlined in paragraph 11. The County shall send a copy of any new departmental or County wide employer-employee relations policies affecting the Union or its members to the President of Local 1607.

² §1302. Definitions, (e): "Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

Confronted with general language in a management rights clause, the New York PERB concluded that a broadly worded management rights clause does not constitute a clear and unmistakable waiver of the duty to bargain over the subject of off-duty employment. Ulster County Sheriff's Employees' Association, v. Ulster County Sheriff, N.Y. PERB, Case No. U-13780, 26 NY PER ¶ 4665, (December 9, 1993). See also Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO; New York Finger Lakes Region Police Officers Local 195, Council 82, AFSCME, AFL-CIO; and International Association of Fire Fighters, Local 1446, v. City of Auburn, N.Y. PERB, (Case Nos. U-10232, U-10251, U-10295, , 22 NY PER ¶ 4531 (April 3, 1989).

In AFSCME, Council 81, v. State of Delaware, Dep't. of Transportation, ULP No. 95-01-111, Del.PERB, II PERB 1279, 1293 (1995), the PERB observed:

In Metropolitan Edison Co. v. NLRB (460 US 693 (112 LRRM 3265) (1983)), the Supreme Court stated that general contractual provisions would not support an inference that parties' intended to waive a statutorily protected right unless that intent was explicitly stated. The National Labor Relations Board ("NLRB") has repeatedly held that "generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights." Johnson-Bateman Co., 295 NLRB 26 (131 LRRM 1393) (1989).

To conclude that by agreeing to the general language of Article 104 the Union waived its statutory right to bargain over a policy affecting a term and condition of employment would be contrary to established case law and impose upon the Union a significant limitation unsupported by the evidence of record.

Waiver by Conduct: The initial policy concerned no limitation on the number of outside employment hours permitted which is the focus of the current charge. Consequently, the County's contention that the Union's acquiescence to the terms set forth in the 1994 Policy constitutes a waiver of its right to file a charge alleging that the revised Policy 308 violated the Act is misplaced.

Outside Employment as a Right Reserved to Management Under the Collective Bargaining Agreement: In the absence of specific contract language there is no basis for concluding that the general language of Article 104 reserves to the exclusive prerogative of management the regulation of outside employment during personal time of the EMS Division employees.

Failure to Exhaust Available Contractual Remedies: Section (11), of the collective bargaining agreement, entitled "Grievance Procedure, provides:

- (a) Any grievance or dispute which may arise between the parties concerning wages, hours, and working conditions and the application or interpretation of this agreement shall be taken up in accordance with the procedures outlined below.
- (b) A grievance is expected to state the section(s) of the agreement claimed to be in violation.

This provision establishes that a grievance or dispute subject to resolution through the contractual grievance and arbitration procedure must involve the interpretation or application of the collective bargaining agreement as it pertains to wages, hours or working conditions. Here, there is no contractual provision dealing either directly or indirectly with outside employment. While a contractual issue

is a proper subject for the contractual grievance procedure, an unfair labor practice is statutory in origin and raises a question of statutory interpretation which is the responsibility of the Public Employment Relations Board. Seaford Ed. Assn. v. Bd. of Ed., Del.PERB, ULP No, 87-10-018, I PERB 233, 236 (1988).

The collective bargaining agreement is silent concerning the subject of outside employment. There is, therefore, no dispute or grievance subject to resolution through the grievance and arbitration procedure. Consequently, the Union has not failed to exhaust its contractual remedies.

Deferral: In the absence of a contractual provision addressing the subject of outside employment, this dispute is not a proper subject for deferral under the Board's discretionary deferral policy. Brandywine Affiliated v. Brandywine School District, Del.PERB., ULP No. 85-06-005, I PERB 131, 142 (1986); FOP, Lodge No. 1 v. City of Wilmington, Del.PERB, ULP No. 89-08-040, I PERB 449, 453 (1989); Red Clay Ed. Assn. v. Bd. of Ed. Del. PERB, ULP No. 90-08-052, I PERB 591, 601 (1991).

Statute of Limitations: The County argues that Union President Dunn was aware through his conversations with Commander Tan and various paramedics of the twenty (20) hour cap on outside employment at least as early as March, 1998. The Commander's memorandum dated March 4, 1998, however, was expressly issued for the purpose of "updating the records" of Police and employees in the Emergency Communications and EMS sections concerning outside employment. The memorandum included a requirement that all applications for outside employment contain "the amount of hours to be worked per week."

Adequate notice must include information that enables the Union to make an informed decision. While formal notice may not be required, Commander Tan's letter does not provide even constructive notice that the County had adopted a new criteria for the approval of outside employment beyond a "conflict of interest", namely that outside employment could not exceed twenty (20) hours per week.

President Dunn's unrefuted testimony is that his conversation with Commander Tan regarding the 1998 memorandum concerned only whether or not the memorandum applied to President Dunn, personally, who was self-employed at the time in the auto repair business. In the absence of conversation specifically addressing the weekly twenty (20) hour cap, their conversation does not constitute notice to the Union of a finite hours limitation.

Contrary to the County's claim, the conversations between President Dunn and numerous EMS paramedics concerning the initial rejections of their applications do not constitute notice to the Union of the implementation of a twenty (20) hour weekly cap. President Dunn testified that prior to December, 2000, he never saw the correspondence between the County and any employee concerning outside employment. Although some of the referenced conversations concerning problems with outside employment included, among other things, the subject of hours generally, there was no specific reference to a finite number of permissible hours. In the absence of follow-up contact from these employees, President Dunn reasonably believed the employees' concerns had been satisfactorily resolved.

President Dunn testified:

There was discussion with Paramedics on the

number of hours. There was never a policy change and I never saw anything in writing limiting anyone or denying one employment because of the number of hours. The Union felt it was no issue because there was no policy change or revision.

President Dunn testified that in December, 2000, the Union Treasurer, Paramedic Steven Moore, informed President Dunn that he (Moore) was having a problem obtaining approval for outside employment. He showed President Dunn the following memorandum dated October 3, 2000, from Colonel Cunningham, the Chief of Police:

I am in receipt of your memorandum dated June 21, 2000, requesting permission for outside employment with the Newark Fire Department.

I am granting permission for your employment with the stipulation that you keep your hours within departmental guidelines. Please remember that all extra duty employment is limited to a maximum of twenty (20) hours per week. (TR p. 61)

The burden of proof rests with the party raising the defense. Based upon the evidence presented, the County has failed to establish that AFSCME had neither actual nor constructive notice of the twenty (20) hour restriction until the issuance of the revised policy effective January 4, 2001.

Having disposed of the affirmative defenses raised by the County, the critical determination is whether revised Policy 308 constitutes a term and condition of employment which is a mandatory subject of bargaining or a matter within the exclusive prerogative of the public

employer about which bargaining is not required. Appoquinimink Ed. Assn.
v. Bd. of Ed. Del. PERB, ULP No. 1-3-84-3-2 I PERB 35, 40 (1984).

A hearing will be promptly scheduled for the limited purpose of receiving evidence and argument concerning this issue.

November 20, 2001

(Date)

/s/Charles D. Long Jr.

Charles D. Long, Jr.,
Executive Director